Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:PHI:TL-N-2656-01
KLGorman

date:

to: Margaret M. Crouse
Appeals Team Case Leader, LMSB Area 1

from: Associate Area Counsel
(HMCT:LMSB/2:Phil)

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subject: [redacted]
Years [redacted]-[redacted]

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Facts

This memorandum responds to your request for assistance dated April 20, 2001. This memorandum should not be cited as precedent. The facts forming the basis of this advice are those provided to us as set forth below.

On [redacted], [redacted] ("taxpayer") filed claims for refund, based on three separate issues, in the aggregate respective amounts of $[redacted], $[redacted], and $[redacted] for the years [redacted], [redacted], and [redacted]. Examination undertook a review of the claims and the taxpayer's original returns. On [redacted], examination issued a thirty-day letter that reflected that the taxpayer underpaid, not overpaid, his taxes for the years [redacted] through [redacted]. While examination allowed two of the three items set forth on the refund claim, additional items were disallowed from the original returns to offset any allowances. The assessment of the proposed underpayments was barred by the statute expiration for [redacted]. The

[redacted] and [redacted] years remain open.[1]

On [redacted], the taxpayer's representative filed a Protest contesting the offsetting adjustments to the original returns and the one additional deduction that was disallowed as part of the claims for refund.

On or about [redacted], the Examination Case Manager submitted a Form 2297, "Waiver of Statutory Notification of Claim Disallowance", directly to the taxpayer. The Form was not provided to the power-of-attorney. We understand that the audit team often dealt directly with taxpayer and their Executive Vice President of Finance on various matters during the audit. The Form specified that it waived the requirement under section 6532(a)(1) requiring the Service to send a notice of claim disallowance to the taxpayer by certified or regular mail. The Form further provided as follows:

> I understand that the filing of this waiver is irrevocable and it will begin the two-year period for filing suit for refund of the claims disallowed as if the notice of disallowance had been sent by certified or registered mail.

With respect to the amount of the claims and the portions denied, the Form stated as follows:

Year	Amount of Claim	Amount of Claim Disallowed
[redacted]	$ [redacted]	$ [redacted]

According to your memorandum the figures contained in the column titled "Amount of Claim Disallowed" were in error. The figures did not tie into the proposed adjustments set forth in the thirty-day letter. The thirty-day letter disallowed all of the amounts claimed. The taxpayer signed the Form on [redacted], but there is no indication in our file as to when the Form was returned to the Service.

On [redacted], the examination division prepared a draft

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[1] If the taxpayer cannot file a claim for refund with the District Court due to lack of subject matter jurisdiction based on sections 7422 and 6532, it would not be able to raise the overpayment issues for the years [redacted] and [redacted] before the Tax Court if they were issued a statutory notice of deficiency for [redacted] and [redacted] and filed a petition. I.R.C. § 6512(b)(3).

of an RAR revising some of the figures contained in the thirty-day letter. You refer to this as a "mock RAR." For unspecified reasons, the draft RAR was never provided to the taxpayer or his representative. We are uncertain whether or not the results of these revisions were otherwise informally made known to the taxpayer. The draft RAR still asserted that for [redacted] and [redacted] barred underpayments existed. The draft RAR indicates that the taxpayer may have had an overpayment of $[redacted] in [redacted]. The case was then forwarded to appeals. Your memorandum was silent as to whether examination made any recommendations to appeals with respect to the draft RAR.

At a pre-conference meeting on [redacted], you asked the Examination Case Manager the basis for the numbers provided in the "Amount of Claim Disallowed" column on the Form 2297. On [redacted], the Case Manager advised you that the figures were in error and that a new Form 2297 would be solicited. On [redacted] the Case Manager provided a revised Form 2297 to the taxpayer. Again, since Examination was regularly dealing directly with the taxpayer at the audit site, the Form was not routed through the taxpayer's representative. The Form 2297 disallowed the entire amount of the claims. In so doing, the District disregarded the draft RAR that showed an overpayment for [redacted]. The taxpayer's Executive Vice- President of Finance signed the revised Form on [redacted] and it was received by the Service on [redacted]. The Form was then forwarded to appeals for association with the case file.

During appeals consideration, the appeals officer and the taxpayer's representative discussed the merits of the underlying claims. Neither the appeals officer nor the taxpayer's representatives discussed the Form 2297. When discussing case closing procedures, and prior to the expiration of the two-year period ste forth in the Form 2297, the appeals officer advised the taxpayer's representatives and members of the tax department that she intended to issue a statutory notice of claim disallowance with respect to the claims for refund. The person signing the Form 2297 was not present for these discussions.

On [redacted], you sent a Form 870-AD to the taxpayer's representative reflecting resolution of the issues other than the one disputed issue raised in the claims for refund. We understand that the Forms 870-AD reflected underpayments for each of the years at issue. At the taxpayer's request the Form 870-AD included language reserving the taxpayer's right to "timely file suit for refund" and "file and prosecute claims for refund". Of course, at that time the statute under the Form 2297 remained open.

The period for filing a refund pursuant to the revised Form 2297 expired on [redacted]. After reviewing the file on [redacted], the appeals officer first noticed the Form 2297 and advised the taxpayer's representative that the statute had run.

The taxpayer complains that the Form 2297 is invalid. First, the taxpayer alleges that the person signing the Form 2297 for the corporation misunderstood its effect. Second, the taxpayer alleges that the Service failed to follow unspecified internal procedures for obtaining the Form 2297. We assume this comes from the fact that the Case Manager gave the Form to the taxpayer rather than the power-of-attorney. Finally, the taxpayer argues that the Service knew the claim was unagreed and that the taxpayer intended to file a claim. The taxpayer alleges that appeals made misrepresentations that they would issue a notice of claim disallowance and that led the taxpayer to believe that the two year period had not yet run or had been tolled.

You have requested us to provide our opinion on whether equitable estoppel could apply to preclude us from relying on I.R.C. § 6532 as a bar to a refund suit. If estoppel could apply, you request our opinion on whether the stated facts justify a finding of estoppel. As set forth below, we do believe that estoppel can be legally asserted nor do we believe that the facts support any claim for estoppel.

Discussion

Our first comments are directed to the taxpayer's claims that the person signing the Form 2297 did not appreciate or understand its significance. We find this claim to be wholly irrelevant to the issues. The Form was signed by a person within the organization who had actual or apparent authority. The Form is clear on its face and not ambiguous. The taxpayer's alleged failure to understand the document has no legal import.

Our next point of discussion concerns whether any equitable exceptions exist that would extend the statutory time period for filing a refund suit under section 6532(a). It is clear that no such equitable exception is available to the taxpayer.

The United States, as sovereign, is immune from suit except in instances where it consents to be sued and the terms of that consent govern a court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 586 (1941). Waivers of sovereign immunity must be explicit not implied. See United

States v. Testan, 424 U.S. 392, 399 (1976). Thus, statutes waiving this immunity must be strictly construed in the Government's favor. Sherwood, 312 U.S. at 590. Although statutes containing a waiver of immunity are strictly construed, the Supreme Court has found that such statutes may be subject to an equitable tolling if the statute contains an "implied" equitable tolling exception in the statute of limitations. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93-94 (1991).

The Supreme Court has definitively ruled on the issue of when an implied equitable exception can be read into a federal tax statute. United States v. Brockamp, 519 U.S. 347 (1997). In *Brockamp*, the Court ruled unanimously that I.R.C. § 6511 contained no implied equitable tolling exception. Id. at 352. The Court found nothing in the statute that indicated Congressional intent to read in "unmentioned, open-ended, "equitable" exceptions into the statute that it wrote." Id. The Court noted that tax law "is not normally characterized by case specific exceptions reflecting individualized equities." Id. The Court found that section 6511's detail, technical language, listed procedural limitations, and its explicit listing of exceptions ran contrary to a finding of any implied equitable exception. Id.

Various decisions subsequent to the *Brockamp* opinion have correctly held that there is no equitable exception to section 6532(a). RHI Holdings Inc. v. United States, 142 F.3d 1459 (Fed. Cir. 1998), Marcinkowsky v. United States, 206 F.3d 1419 (Fed. Cir. 2000), Thomasson v. United States, 97-1 USTC ¶ 50,430 (N.D. CA 1997); See also, Becton Dickinson and Company v. Wolkenhauer, 215 F.3d 340 (3d Cir. 2000) *remanding* 24 F. Supp. 2d 375 (D. NJ 1998) (Relying on Brockamp, the court found that the limitations on levy suits of section 6532(c) created a jurisdictional bar to equitable tolling).

The facts of the *RHI Holdings Inc.* case are closely analogous to those involving your taxpayer. In that case RHI filed Forms 2297, missed the deadlines and alleged that the actions of the Service caused them to miss the two-year deadline. RHI alleged that the Service was equitably estopped from raising the statute issue. The Court did not get to the estoppel claim since it found that the statute contained no equitable exception

after applying the analysis found in *Brockamp*. RHI Holdings Inc., 142 F.3d at 1462-1463. In reaching its decision the Federal Circuit set forth the following analysis, which is directly on point with our issue.

> The statute of limitations in this case 26 U.S.C. § 6532, is part of the same statutory scheme as the statute of limitations in *Brockamp*. Section 6532(a) sets forth its limitations in a detailed, technical manner, and reiterates the two year period of limitations in subsections (1), (2) and (3).... It prescribes a particular process for extending the two year period in subsection (2), and this strongly implies that there are no other exceptions to the statutory period.... Moreover, subsection (4) states that any further action taken by the Secretary after a notice of disallowance is mailed to the taxpayer does not operate to extend the statutory period. ...This language explicitly prohibits equitable considerations based on the actions of IRS after a notice is mailed. Since a waiver filed under subsection (3) stands in place of the notice of disallowance issued under subsection (1), this section applies equally to actions of the IRS after a waiver is filed as after a notice of disallowance is mailed. Base on this analysis, **there is less reason to believe that section 6532 has an implied equitable exception than section 6511**,...examined by the Supreme Court in *Brockamp*. prohibit (emphasis added)

Id. at 1462. Wolckenhauer, 215 F.3d 340 (Third Circuit cites, with approval, the opinion in RHI Holdings Inc.) and See also, Thomasson, at 88,092 ("The argument against allowing equitable estoppel is actually stronger when applied to § 6532 than § 6511").

The taxpayer cannot distinguish *Brockamp* from its own situation by alleging that the Supreme Court case involved equitable tolling not equitable estoppel. This argument was raised and rejected in Thomasson. Id. There the court found that *Brockamp* imposed a "blanket bar to non-statutory extensions of limitations." Id. It is also noted that § 6532(a)(2) contains a specific provision only allowing extension of the statute by written agreement of the Secretary and the taxpayer. Section 6532(a)(4) provides, in part, that any action by the Secretary after mailing of the notice of disallowance does not extend the limitations period. These provisions preclude any equitable extension of the limitations period. As such the District Court lacks subject matter jurisdiction over any refund claims.

Even if the taxpayer could raise an estoppel argument, the facts would not support an estoppel against the Service.

The general elements of proof required to establish an equitable estoppel claim are; (1) a misrepresentation of fact knowing that the other party intends to rely thereon, (2) reasonable reliance to the detriment of the aggrieved party, and (3) the aggrieved party was ignorant of the true facts. See United States v. Asmar, 827 F.2d 907, 912 (3d Cir. 1987) *citing* Heckler v. Community Health Services, 467 U.S. 51, 61 (1984), In re Kaplan, 104 F.3d 589, fn. 27 (3d Cir. 1997). The Third Circuit also imposes a fourth element for estoppel claims asserted against the Government. The fourth element requires the party claiming relief to establish the existence of some "affirmative misconduct" and not merely omission or negligent failure on the part of agent government agent. Asmar, 827 F.2d at 912.[2] Claims of estoppel against the Government are applied only in "rare and extreme" circumstances. United States v. Pepperman, 996 F.2d 123, 131 (3d Cir. 1992). Claims of estoppel against the Service are viewed with especial rigor. Bachner v. Commissioner, 81 F.3d 1274 (3d Cir. 1996) *citing* Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 187 (1957).

The Service made no misrepresentation of fact upon which the taxpayer reasonably relied. [redacted]. To the extent the taxpayer claims that the Service advised it that the statute was open, this is a misstatement of law not fact. Reliance upon such a statement by a financial officer would not be reasonable in any event. Further, one dealing with an employee of the government is charged with notice of the limitations of the employee's authority. Tallal v. Commissioner, 77 T.C. 1291 (1981); See also Wilber National Bank v. United States, 294 U.S. 120 (1935) (Government not estopped where its agents attempted to cause to be done that which the law did not sanction or permit). The appeals officer had no authority to orally extend the statute. The statute specifies that the limitations period could only be extended in writing.

The taxpayer did not reasonably rely on the representation that the Service would issue a statutory notice of claim

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[2] The Supreme Court has hinted that even affirmative conduct may be insufficient to estop the Government when matters of the public fisc are involved. See Schweiker v. Hansen, 450 U.S. 785, 788-789 (1981).

disallowance. Those who deal with the Government "are expected to know the law and may not rely on the conduct of Government agents contrary to the law." Heckler, 467 U.S. at 63. Section 6532 specifically provides that actions of the Service do not extend the period of limitations. The taxpayer is charged with knowledge of that law. The taxpayer's reliance was not reasonable.

The taxpayer cannot claim the benefits of an estoppel because it knew the true facts. Even if the taxpayer alleges that we misrepresented the correct time for filing the refund suit, its argument will fail because it was aware of the signing of the Form 2297 and knew of the correct time for filing suit.

The taxpayer has not alleged any misrepresentation that amounts to "affirmative misconduct" as required to bring an estoppel claim against the Service in cases in the Third Circuit. Under the facts alleged, neither party closely looked at the Form 2297 prior to its expiration although both were aware of its content. This inattentiveness is not sufficient to establish affirmative misconduct. See INS v. Miranda, 103 S.Ct. 281, 283-284 (1982) (inaction, delay, or sloth on the part of Government insufficient to support estoppel).

Finally, we find no merit to the taxpayer's claims that the service did not follow its own procedures in processing the Form 2297. [redacted]

Generally, manual procedures governing the way the Service operates internally are considered directory, not mandatory, provisions. Cleveland Trust Co. v. Commissioner, 421 F.2d 475 (6th Cir. 1970) *cert. denied* 400 U.S. 819, Luhring v. Glotzbach, 304 F.2d 560 (4th Cir. 1962), Einhorn v. DeWitt, 618 F.2d 342 (5th Cir 1980). Since the Internal Revenue Manual governs internal affairs it generally does not have the effect of law and does not convey rights to a taxpayer or create a separate cause of action for the taxpayer. United States v. Caceres, 440 U.S. 741, 752 (1973), Cargill Inc. v. United States, 173 F.3d 323, 340, n. 43 (5th Cir. 1999). If the agency rules are mandated by the Constitution, or a statute, then violation of those rules may be a violation of due process. See Riland v. Commissioner, 79 T.C. 185, 201-202 (1982)(following *Caceres* and finding that violations of the IRM did not justify suppression of evidence unless the procedures were mandated by the Constitution or a statute). We

have not been advised of any statute requiring the service to recognize the power-of-attorney. We are unaware of any overriding constitutional obligation. Accordingly, we do not believe the unspecified violation of unnamed IRM procedures jeopardizes the result in this case. This is particularly true in light of the above discussion.

Please contact our attorney, Keith Gorman on (215) 597-3442 if you have any questions regarding this advice.

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Associate Area Counsel
(Large and Mid-Size Business)

cc: Senior Legal Counsel (HQ) Harve M. Lewis
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